

**IN THE
SUPREME COURT
STATE OF MISSOURI**

No. 86332

**HALLMARK CARDS, INC.,
Appellant,**

v.

**DIRECTOR OF REVENUE, STATE OF MISSOURI,
Respondent.**

**ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE KAREN A. WINN, COMMISSIONER**

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

The principal issue before the Court involves the construction of sections 144.190,¹ 32.065, 32.068 and 32.069, RSMo Cum. Supp. 2003, and whether Appellant was entitled to interest that accrued under sections 144.190 and 32.065 through December 31, 2002, on sales tax that it overpaid from June 2000 through May 2003. Primarily, the questions presented are: (1) whether section 32.069 denies interest that accrued under sections 144.190 and 32.065; and (2) if so, whether because that construction would deny interest that had accrued prior to the passage of section 32.069, that section is a retrospective law that violates Article I, § 13 of the Missouri Constitution.

Thus, the Court's review of this case will necessarily involve the construction of sections 32.065, 32.068, 32.069, and 144.190, which are revenue laws of the State of Missouri. This Court has exclusive jurisdiction over these issues pursuant to Article V, § 3 of the Missouri Constitution.

¹ Unless otherwise indicated, all statutory references are to the 2000 Revised Statutes of Missouri.

STATEMENT OF FACTS

The relevant facts of this case are simple, straightforward and undisputed.

Accordingly, the Administrative Hearing Commission (“Commission”) decided this case upon a motion for summary determination filed by Hallmark Cards, Inc. (“Hallmark”) under the Commission’s regulation 1 CSR 15-3.440(3)(Appendix (“App.”) 1).² This appeal is of that decision (App. 8-16).

Hallmark is engaged in the manufacture of numerous products, most notably greeting cards (L.F. 20). It does business in Kansas City, Missouri (L.F. 20). Hallmark overpaid to the Director certain Missouri and local sales tax for the periods June 2000 through May 2003 (L.F. 6-7, ¶ 4; L.F. 40-41). On June 18, 2003, Hallmark filed a claim for refund of that overpaid tax (L.F. 40). The Director made certain agreed-to adjustments to the claim for refund and, on October 21, 2003, issued a refund of \$553,705.93 to Hallmark (L.F. 41). The Director issued the refund within 120 days from the date that the Director determined the correct amount of the adjusted refund claim (L.F. 15, fn. 4). The Director did not grant interest to Hallmark on the refund under the purported authority of section 32.069, RSMo Cum. Supp. 2003 (L.F. 7, ¶ 8). Interest accruing through December 31, 2002, on the adjusted overpayments is \$40,886 (L.F. 41).

² Although the Director did not move for summary determination, the Commission’s regulation allows it to rule against the moving party, which the Commission did in this case.

Since sections 32.068 and 32.069 have been enacted, the Director has calculated interest on refunds by applying the rate under section 32.065 for interest accruing prior to January 1, 2003, and by applying the rate under section 32.068 for interest accruing thereafter (L.F. 53).

STANDARD OF REVIEW

The decision of the Commission shall be reversed if it is not authorized by law.

Section 621.193, RSMo; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996). This Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000). When considering an appeal from summary judgment, the court reviews the record in the light most favorable to the party against whom judgment was entered and must accord the nonmovant the benefit of all reasonable inferences therefrom. *Boersig v. Missouri Dep't of Corr.*, 959 S.W.2d 454, 456 (Mo. banc 1997).

POINTS RELIED UPON

I.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING INTEREST ON THE REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT SECTION 32.069, RSMO CUM. SUPP. 2003, DOES NOT BAR INTEREST THAT ACCRUED UNDER SECTION 32.065.

Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82 (Mo. banc 1993);

Bachtel v. Miller County Nursing Home District, 110 S.W.3d 799 (Mo. banc 2003);

Utilicorp United, Inc. v. Director of Revenue, 785 S.W.2d 277 (Mo. banc 1990).

II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING INTEREST ON THE REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THE COMMISSION'S CONSTRUCTION OF SECTION 32.069, RSMO CUM. SUPP. 2003, RENDERS IT AN ILLEGAL RETROSPECTIVE LAW THAT VIOLATES ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION.

Lincoln Credit Company v. Peach, 636 S.W.2d 31 (Mo. banc 1982),

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(Mo. banc 1999).

ARGUMENT

I.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING INTEREST ON THE REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT SECTION 32.069, RSMO CUM. SUPP. 2003, DOES NOT BAR INTEREST THAT ACCRUED UNDER SECTION 32.065.

A. Introduction

Hallmark overpaid its Missouri and local sales tax in the amount of \$553,705.93 during the periods June 2000 through May 2003. The Director granted Hallmark's refund claim in that amount. However, the Director denied interest that had accrued under section 32.065 through December 31, 2002, claiming section 32.069 as authority. But section 32.069 is no basis to deny interest that has accrued under sections 144.190 and 32.065.

B. The Express Words of Sections 144.190 and 32.065 Entitle Hallmark to Interest and Nothing in Sections 32.068 or 32.069 Nullify Those Words

Section 144.190.2 (App. 2-3) provides that if any sales tax, penalty or interest has been overpaid, such sum shall be credited to the taxpayer on taxes then due "and the balance, *with interest as determined by section 32.065, RSMo* shall be refunded[.]"³ Section 32.065 (App. 4) sets forth the mechanism for determining the annual interest rate that is set once per year. Sections 144.190 and 32.065 have not been amended or repealed during the

³ Emphasis added here and throughout unless otherwise noted.

periods at issue and remain in full force and effect. Under these express words, Hallmark is entitled to interest that accrued through December 31, 2002 on its sales tax overpayments.

In Senate Bill 1248, the Missouri General Assembly enacted sections 32.068 and 32.069, RSMo Cum. Supp. 2003. Section 32.068 sets forth a different, and less generous,⁴ method of calculating interest than the method in section 32.065. Although section 32.068 was signed into law on June 19, 2002, and became effective on that date, by its own terms, the interest computation of section 32.068.3 did not apply until January 1, 2003. Section 32.068 (App. 5) provides:

1. The state treasurer shall calculate an annual rate of interest pursuant to this section and provide the calculated rate of interest to the director of revenue as determined by subsection 2 of this section.
2. Each calendar quarter the state treasurer shall calculate the annual rate of interest. The rate of interest shall be equal to the previous twelve-month annualized average rate of return on all funds invested by the state treasurer, rounded to the nearest one-tenth of one percent. The state treasurer shall provide such calculated rate to the director of revenue not later than thirty

⁴ Section 32.065 computes interest in relation to the “adjusted prime rate charged by banks.” Section 32.068 computes interest in relation to “the annualized average rate of return on all funds invested by the state treasurer.”

days prior to the end of each calendar quarter. The director or revenue shall apply the calculated rate of interest to all applicable situations during the next calendar quarter after the release of the calculated rate of interest.

3. **Beginning January 1, 2003**, the director of revenue shall **apply** the calculated **rate** of interest as determined by this section to all applicable situations.

4. In fiscal year 2003, the commissioner of administration shall estimate the amount of any additional state revenue received pursuant to this section and shall transfer an equivalent amount of general revenue to the schools of the future fund created in section 163.005, RSMo.

A refund is an “applicable situation.” Therefore, the Director is to “**apply**” the section 32.068 “calculated **rate** of interest” effective January 1, 2003.⁵ Nothing in section 32.068 instructs the Director to disregard section 32.065’s calculated rate of interest for interest accruing prior to January 1, 2003. Indeed, the Director’s interest rate section of her internet website shows that interest on refunds is calculated under section 32.065 for periods prior to 2003 and under section 32.068 for all periods on or after January 1, 2003. This is evident from two things. First, the rate for deficiencies and refunds is the same

⁵ Hallmark concedes that section 32.068 is the more recent statute and that its rate, rather than section 32.065’s rate, applies to interest accruals on or after January 1, 2003.

prior to 2003.⁶ Second, the interest rates on refunds are lower, are adjusted quarterly, and started in 2003.

The Director contends that section 32.069 authorizes her to deny the payment of interest to Hallmark. Section 32.069.1 (App. 6) provides:

Notwithstanding any other provision of law to the contrary,
interest shall be allowed and paid on any refund or overpayment
at the rate determined by section 32.068 only if the
overpayment is not refunded within one hundred twenty days
from [certain defined events].

Because the Director sustained Hallmark's refund claim within 120 days, she claims that Hallmark is due no interest determined under any statute.

Proper statutory construction starts with the words of the statute. *Bachtel v. Miller County Nursing Home District*, 110 S.W.3d 799, 801 (Mo. banc 2003). The Commission, by applying section 32.069 as it did, rendered the words "**at the rate determined by section 32.068**" mere surplusage. That interpretation violates a cardinal rule of statutory construction "that the legislature intend[s] that every word, clause, sentence and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert

⁶ Hallmark notes the Commission's conclusion that interest on sales tax deficiencies was an "applicable situation" to which section 32.068's lower interest rate would apply (L.F. 45). That conclusion is contrary to the way the Director is computing interest on deficiencies, according to the published website.

idle verbiage or superfluous language in a statute.” *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993). Had the Missouri General Assembly intended to bar interest calculated under any statute when the Director timely acts on a refund claim, it would have been a simple matter to say so by excluding the above-emphasized clause.

C. Section 32.069 Should Not Operate Retrospectively

The Commission’s construction of section 32.069 allows it to retrospectively nullify interest that accrued prior to its passage contrary to the presumption that substantive statutes apply only on a prospective basis. *Lincoln Credit Company v. Peach*, 636 S.W.2d 31, 34 (Mo. banc 1982), *appeal dismissed*, 459 U.S. 1094 (1983); *Department of Social Services v. Villa Capri Homes*, 684 S.W.2d 327, 332 (Mo. banc 1985). To overcome this presumption, a Missouri court must determine that legislative intent to give the statute retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication. No such express or implied intent exists with regard to section 32.069.

Senate Bill 1248, which enacted sections 32.068 and 32.069, provides no evidence of any intent to apply section 32.069 retroactively. Indeed, the act itself demonstrates that the Legislature intended section 32.069 to apply prospectively only effective January 1, 2003. For instance, section 32.068, by its express terms, states that its interest “rates” are to be “appl[ied]” “beginning January 1, 2003.” The instructions to the state treasurer in section 32.068.2 are to calculate, on a quarterly basis, annual interest rates. There is no instruction to calculate any rates for any quarter prior to the first quarter of 2003. The

Director's interest section of her internet website (App. 7) confirms that the treasurer is following the law as written. That is why yearly rates under section 32.065 are listed for all years through 2002 and lower rates adjusted quarterly under section 32.068, are listed thereafter.

Likewise, section 32.069 prohibits (under certain circumstances) the payment of interest "at the rate determined by Section 32.068[.]" Use of the specific reference to section 32.068 shows the Legislature's intention that section 32.069 apply prospectively since section 32.068 did not apply until 2003. This construction is actually supported by the Director's interest section of her internet website, showing that interest is determined under the lower interest rates of section 32.068 starting in 2003.

Utilicorp United, Inc. v. Director of Revenue, 785 S.W.2d 277, 278 (Mo. banc 1990), is an analogous case. There, the question was whether an amendment to section 144.190 to grant interest on refunds would be applied to accrue interest for periods prior to the effective date of amendment. The Court concluded that nothing in the text of section 144.190 as amended evidenced an intent to retroactively apply the right to interest. Accordingly, this Court concluded that interest on overpayments did not begin to accrue until the amendment of section 144.190 became effective. Here, rather than merely an absence of words showing an intent that the law be applied retroactively, the words of the statutes affirmatively show an intent for prospective-only application beginning January 1, 2003.

Last, it is appropriate for this Court to construe section 32.069 in such a way as to avoid the constitutional challenge set forth in point II. *State ex rel. Union Electric v.*

Public Service Commission, 687 S.W.2d 162, 165 (Mo. banc 1985). By construing section 32.069 to retrospectively nullify interest that had accrued under section 32.065 prior to the adoption of section 32.069 directly implicates section 32.069's constitutionality under Article I, section 13 of the Missouri Constitution.

II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING INTEREST ON THE REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THE COMMISSION'S CONSTRUCTION OF SECTION 32.069, RSMO CUM. SUPP. 2003, RENDERS IT AN ILLEGAL RETROSPECTIVE LAW THAT VIOLATES ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION.

A. Introduction

Under the Commission's construction of section 32.069, it takes away interest that accrued under section 32.065 for all periods prior to June 19, 2002, the effective date of section 32.069.

Hallmark made overpayments both prior to and after January 1, 2003. Interest began accruing at the time the overpayments were made and, under section 144.190.2, continued to accrue under section 32.065 until January 1, 2003, when section 32.068 replaced section 32.065 and conditional additional interest accrual occurred under section 32.068. Hallmark concedes that if section 32.069 is constitutional, it would in this case bar interest that accrued under section 32.068 from January 1, 2003 until the date that the refund issued. But if the Commission's construction of section 32.069 is correct, it is an unconstitutional retrospective law and, as a consequence, void. Accordingly, Hallmark would be entitled not only to interest that had accrued under section 32.065 through December 31, 2002, but also to interest that accrued under section 32.068 from January 1, 2003 through the date the refund issued.

B. Retrospective Operation of Section 32.069 Renders It Unconstitutional

Article I, § 13 of the Missouri Constitution provides:

That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

This clause invalidates all laws that purport to affect substantive rights on a retroactive basis. This Court in *UtiliCorp* concluded that a statute allowing for interest (section 144.190) was a substantive statute to which the prohibition applied (“A legislative provision for the allowance of interest when the same is forbidden in the absence of legislation is a law of substance rather than procedure”). *Id.* At 278. Retrospective laws are those that “take away or impair vested rights acquired under existing laws, or created a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed.” *State ex rel. St. Louis-San Francisco Railway Company v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974), *citing Barbieri v. Morris*, 315 S.W.2d 711, 714 (Mo. 1958). A “vested” right is one that is “fixed, **accrued**, settled or absolute.” *La-Z-Boy Chair Company v. The Director of Economic Development*, 983 S.W.2d 523 (Mo. banc 1999) (citing *Robbins v. Robbins*, 463 S.W.2d 876, 879 (Mo. 1971)). The interest at issue in this case is **accrued interest** under section 32.065. The Commission’s construction of section 32.069 **takes away** Hallmark’s vested right to interest that had already **accrued** under sections 144.190 and 32.065 as of June 19, 2002, the effective date of section 32.069.

This case is analogous to *Rees Oil Company v. Director of Revenue*, 992 S.W.2d 354 (Mo. App. W.D. 1999). There, Rees sought a refund of fees that it overpaid into the Underground Storage Tank Insurance Fund under a statutory regime that was declared invalid as to persons that could not possibly benefit from the Fund. *See Reidy Terminal, Inc. v. Director of Revenue*, 898 S.W.2d 540 (Mo. banc 1995). The Legislature subsequently expanded the regime to afford taxpayers like Reidy and Rees a right to benefit from the Fund. The Director of Revenue argued that Rees was not entitled to a refund of overpaid fees because the statutory change should be applied on a retroactive basis to remove the constitutional infirmity of the old regime. The Court of Appeals disagreed. It concluded that Rees had a vested right in a refund for the period covered by the prior version of the statute, and that an interpretation barring such a refund would constitute an unconstitutional retrospective law. In so ruling, the court labeled as “misleading,” the Fund Trustees’ argument that Rees’ right to a refund had not vested because “the right must be more than a mere expectation based upon an anticipated continuance of the existing law.” The court responded that:

Rees’ right to a refund is not based upon the continuance of the statutes as written, but instead is based upon the statutes as [they] existed when Rees paid the transport load fees[.] ... Under the Trustees’ formulation, any subsequent statutory change could forever bar a claimant from receiving what is rightfully due them under the existing law.

Similarly, Hallmark sought interest that had accrued under existing law, namely sections 144.190 and 32.065. By taking away Hallmark's right to the interest that already accrued under section 32.065, section 32.069 (at least as construed by the Commission) was an illegal retrospective law.

La-Z-Boy is also instructive. *Id.* At 525. There, this Court determined that the taxpayer had no vested right to a tax credit for ten years because the statute provided that the credit was good "for a period not to exceed ten years" rather than "for a period of ten years." Although the Court expressly refused to opine on the point, one could infer that the decision would have been different had the statute been definite on awarding a ten-year credit. Unlike the tax credit in *La-Z-Boy*, sections 144.190 and 32.065 are definite in their grant of the right to interest on overpayments. That right was a vested right, a right that the Legislature could not retroactively impair or take away.

In *UtiliCorp*, this Court concluded that the state had a vested right to be free from interest and, accordingly, concluded that the amendment of section 144.190 to allow for interest must apply on a prospective only basis. *Utilicorp* at 279. So too, when amendments restrict the rights to existing statutory interest, those amendments must apply prospectively. It is fundamentally unfair to change the rules of the game after it has been played, but that is precisely what the Commission's construction of section 32.069 does.

In conclusion, if section 32.069 was intended to take away the right to interest that had already accrued prior to June 19, 2002, such intent renders section 32.069 unconstitutional because it would impair a taxpayer's right to interest that had already accrued. If that was what the Legislature intended, then section 32.069 must be declared

invalid under Article I, § 13 of the Missouri Constitution. Hallmark would therefore be entitled to interest under section 32.065 through December 31, 2002, **and also** to interest under section 32.068 accruing thereafter.

CONCLUSION

For all of the foregoing reasons, Hallmark is entitled to accrued interest. The Commission's decision to the contrary should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this ____ day of November, 2004, to Jim Layton, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102.

CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 3,876 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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